STATE OF MICHIGAN

COURT OF APPEALS

ADRIAN ENERGY ASSOCIATES, LLC, CADILLAC RENEWABLE ENERGY LLC, GENESEE POWER STATION, LP, GRAYLING GENERATING STATION, LP, HILLMAN POWER COMPANY, LLC, T.E.S. FILER CITY STATION, LP, VIKING ENERGY OF LINCOLN, INC., and VIKING ENERGY OF MCBAIN, INC., Plaintiffs-Appellants,	UNPUBLISHED November 3, 2005
v	No. 255319 Ingham Circuit Court
CONSUMERS ENERGY COMPANY, Defendant-Appellee.	LC No. 03-001799-CZ

Before: Cooper, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

Plaintiffs, various "qualifying facilities" (QFs) from which defendant Consumers Energy purchases wholesale power, appeal as of right from the trial court's order dismissing their case without prejudice in deference to the primary jurisdiction of the Michigan Public Service Commission (MPSC). We affirm the trial court's determination to defer to the primary jurisdiction of the MPSC. However, we reverse the court's dismissal of plaintiffs' claims, as the court should have stayed the proceedings pending the resolution of the MPSC action. Accordingly, on remand, the trial court should consider all issues not disposed of by the MPSC.

I. Facts and Procedural History

Plaintiffs are QFs as defined by the federal Public Utility Regulatory Policies Act of 1978 (PURPA).[1] They generate electricity using alternative fuel sources and sell their output to defendant pursuant to individual power purchase agreements (PPAs) as authorized under the

[1] PL 95-617, 92 Stat 3117.

act.[2] Defendant must purchase plaintiffs' power for its full "avoided cost"—the amount it would have cost to generate, or to construct facilities to generate, the same power itself or purchase the power from a facility using non-alternative fuel sources.[3] In connection with these PPAs, the MPSC determined defendant's avoided costs and required payments to plaintiffs through a series of utility rate cases.[4]

In 1998, defendant overhauled its own generating plants to burn a cheaper kind of coal, and thereafter reduced the price it paid to plaintiffs under the avoided cost formula in their PPAs. However, plaintiffs alleged that defendant did not reduce the cost to its customers of the electric power it purchased from plaintiffs.[5] Therefore, plaintiffs filed suit in 2003, alleging breach of contract and unjust enrichment. They challenged defendant's unilateral reduction of the purchase price of its power, alleging that the method of calculating defendant's avoided cost was fixed when the PPAs were signed. Plaintiffs alleged that the type of coal used by defendant when the parties entered the PPAs was a fixed reference in the avoided cost formula, with the only variable being the market price for that specific kind of coal. Plaintiffs also sought equitable relief: a declaratory judgment that defendant was required to use the cost of the original type of coal in its avoided cost formula; an injunction barring defendant from changing the PSCR formula to reduce payments to plaintiffs under a promissory estoppel theory; and the implementation of a constructive trust for the funds that defendant allegedly improperly retained after reducing payments to plaintiffs.

Defendant responded by filing a motion for summary disposition under MCR 2.116(C)(6) and MCR 2.116(C)(7), asking the court to dismiss plaintiffs' claims and defer to the expertise of the MPSC based on the doctrine of primary jurisdiction. Defendant argued that plaintiffs had filed a motion to intervene in a case then before the MPSC, U-13917, which would address identical issues as those raised by plaintiffs in the circuit court.[6] Defendant further argued that

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[2] 16 USC 824a-3(a).

[3] See 18 CFR 292.101(b)(6); *ABATE v MPSC*, 216 Mich App 8, 11-12; 548 NW2d 649 (1996); *Consumers Power Co v MPSC*, 189 Mich App 151, 157-159; 472 NW2d 77 (1991).

[4] After entering several orders setting the rates to be paid to the individual plaintiffs contemporaneous to the entry of their PPAs, the MPSC entered a series of orders approving amended energy charge calculation methods between 1989 and 1993, in U-8871 *et al.* and U-10127, that affected all plaintiffs. Those orders have been the subject of a series of appellate opinions dating from 1991. *Consumers Power Co*, *supra*, 189 Mich App 151; *Consumers Power Co v MPSC*, 192 Mich App 180; 481 NW2d 1 (1991); *ABATE v MPSC*, *supra*, 216 Mich App 8; *ABATE v MPSC*, 219 Mich App 653; 557 NW2d 918 (1996).

[5] Defendant recovered the cost of purchasing alternative power from its customers through a power supply cost recovery (PSCR) clause in its retail rate schedule. MCL 460.6j *et seq.* In 1998, the MPSC suspended the PSCR clause and froze defendant's retail rates at a level that included the higher PSCR rate.

[6] The MPSC proceeding originally involved only defendant's application for approval of its 2004 PSCR plan and calculations. See MCL 460.6j(3). Defendant made a supplemental filing in that proceeding to include plaintiffs' challenges one day before plaintiffs filed suit.

the MPSC's continued jurisdiction was appropriate, as it had conducted extensive proceedings involving the parties after which it had approved each PPA and calculated defendant's avoided costs. Furthermore, defendant contended that most of the PPAs explicitly recognized the continuing jurisdiction of the MPSC to make any amendments to the energy payments, and that all the PPAs included a "regulatory out" clause requiring defendant to remit to plaintiffs only those energy and capacity payments it was allowed to recover from its customers.[7] Defendants further contended that plaintiffs were attempting to alter the rates set by the MPSC[8] and that this Court had already established that the MPSC had jurisdiction to determine the rates paid to plaintiffs under the avoided cost formula.[9] Finally, defendant contended that MPSC jurisdiction was appropriate based on the complexity of the subject matter and the prior proceedings before that commission.

Plaintiffs argued that the MPSC only had jurisdiction to determine avoided costs and instruct defendant regarding the energy capacity it could purchase. They contended that the MPSC did not have jurisdiction, absent independent statutory authority, over contract disputes. Plaintiffs further argued that the MPSC only had jurisdiction over disputes between utilities and their customers, not between utilities and QFs, pursuant to MCL 460.6. The court then determined that summary disposition was inappropriate, as primary jurisdiction only suspends court action until the MPSC has the initial opportunity to rule. Plaintiffs contended that they would be prejudiced if their claims were dismissed, as the statute of limitations would soon expire on the earliest of their claims. The court dismissed plaintiffs' claims without prejudice, finding that the MPSC was empowered to review breach of contract claims under *Travelers Ins Co v Detroit Edison Co.*[10]

While this appeal was pending, MPSC proceedings in U-13917 moved forward. On February 28, 2005, the MPSC entered an opinion and order that disposed of many issues underlying plaintiffs' claims raised in the circuit court. As the MPSC only considered defendant's rates and avoided costs in 2004, it did not affirmatively dispose of any of plaintffs' claims which arose between 1998 and 2003. It also determined that the MPSC was "not in a position to abrogate the contractual commitments of parties." However, the MPSC found that it had an obligation to review the reasonableness and prudence of defendant's plans to purchase power from QFs to meet the needs of its customers pursuant to MCL 460.6j(6). Therefore, it had jurisdiction to review the price paid to QFs under their PPAs. The MPSC also found that its power to review the parties' performance under the PPAs flowed from its power to review and approve those agreements. After a thorough review, the MPSC determined that defendant was

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[7] Plaintiffs contended that such regulatory out clauses are illegal under federal law.

[8] Defendant argued that the regulatory out clause made the dispute a ratemaking question, which gave the MPSC exclusive jurisdiction under MCL 460.6 *et seq.*

[9] In support of its argument, defendant cited *Att'y Gen v MPSC*, 231 Mich App 76; 585 NW2d 310 (1998), *Consumers Power Co, supra*, 189 Mich App 151, and *ABATE v MPSC*, 173 Mich App 647; 434 NW2d 648 (1988).

[10] *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185; 631 NW2d 733 (2001).

not required by the PPAs or the MPSC's prior orders to base its avoided cost on the price of the more expensive coal burned when the agreements were entered. The MPSC's prior orders revealed that avoided costs were to be calculated on defendant's actual ongoing coal costs. Plaintiffs have appealed the decision of the MPSC, which case is also pending in this Court.[11]

II. Primary Jurisdiction Doctrine

On appeal, plaintiffs challenge the trial court's deference to the primary jurisdiction of the MPSC on several grounds.[12] The applicability of the doctrine of primary jurisdiction is a question of law that we review de novo.[13] Primary jurisdiction is "a prudential doctrine of judicial deference and discretion."[14] The Michigan Supreme Court recently discussed the applicability of the doctrine at great length:

> The doctrine of primary jurisdiction is grounded in the principle of separation of powers. . . .
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> The doctrine of primary jurisdiction also reflects practical concerns regarding respect for the agency's legislatively imposed regulatory duties. Adhering to the doctrine of primary jurisdiction reinforces the expertise of the agency to which the courts are deferring the matter, and avoids the expenditure of judicial resources for issues that can better be resolved by the agency. . . .
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> "'Primary jurisdiction' . . . applies where a claim is originally cognizable in the courts, and comes into play *whenever enforcement of the claim requires the resolution of issues* which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." [*United States v Western P R Co*, 352 US 59, 63-64; 77 S Ct 161; 1 L Ed 2d 126 (1956) (emphasis added), citing *General American Tank Car Corp v El Dorado Terminal Co*, 308 US 422, 433; 60 S Ct 325; 84 L Ed 361 (1940). . . .]
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> "The doctrine reflects the courts' recognition that administrative agencies, created by the Legislature, are intended to be repositories of special competence and expertise uniquely equipped to examine the facts and develop public policy

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[11] *Adrian Energy Assocs LLC v MPSC*, Docket No. 261718, consolidated with *Att'y Gen v MPSC*, Docket No. 261747, and *Michigan Environmental Council v MPSC*, Docket No. 264860.

[12] Based on the limited jurisdictional question before us in this appeal, we will not review the propriety of the MPSC's findings of fact and conclusions of law in U-13917.

[13] *Michigan Basic Property Ins Ass'n v Detroit Edison Co*, 240 Mich App 524, 528; 618 NW2d 32 (2000).

[14] *Travelers Ins Co*, *supra* at 187.

within a particular field." Baron, *Judicial review of administrative agency rules: A question of timing*, 43 Baylor L R 139, 158 (1991). Thus, whether judicial review will be postponed in favor of the primary jurisdiction of an administrative agency "necessarily depends upon the agency rule at issue and the nature of the declaration being sought in the particular case." *Id.* at 159.

"No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." [*Western Pacific*, *supra* at 64.]

Several reasons have been advanced for invocation of the primary jurisdiction doctrine. First, the doctrine underscores the notion that administrative agencies possess specialized and expert knowledge to address issues of a regulatory nature. . . . A second consideration relates to respect for the separation of powers and the statutory purpose underlying the creation of the administrative agency, the powers granted to it by the legislature, and the powers withheld. *Id.* This justification includes the principle that courts are not to make adverse decisions that threaten the regulatory authority and integrity of the agency. *Att'y Gen v Diamond Mortgage Co*, 414 Mich 603, 613; 327 NW2d 805 (1982). Third, the doctrine exists to promote consistent application in resolving controversies of administrative law. *Texas* [*& Pacific R Co v Abilene Cotton Oil Co*], 204 US [426,] 440-441[; 27 S Ct 350; 51 L Ed 553 (1907)]. By application of the doctrine,

"[u]niformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." [*Far East Conf*, *supra* at 574-575.]

In *Diamond Mortgage Co*, *supra*, this Court explained its adoption of these justifications for primary jurisdiction.

"In cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined." [*Id.* at 612-613, quoting *Far East Conf*, *supra* at 574-575.]

Thus, this Court recognized application of the primary jurisdiction doctrine to all cases in which it was deemed that an administrative agency possessed superior knowledge and expertise in addressing recurring issues within the scope of their authority. Quoting *Western Pacific*, *supra* at 63-64, the Court concluded that "'primary jurisdiction' . . . applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the

> resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body . . . ." *Diamond Mortgage, supra* at 613 (internal citations omitted).[15]

Plaintiffs contend that, while their claims were "originally cognizable" in the circuit court, the Legislature had not conferred jurisdiction on the MPSC over such disputes. They argue that this case requires only contract interpretation, over which the MPSC has no power. They further contend that QFs are not subject to the jurisdiction of the MPSC. We disagree.

The MPSC only has the authority granted by statutory enactments, which must be strictly construed.[16] Pursuant to MCL 460.6, the MPSC has exclusive jurisdiction to regulate public utilities, including the power to regulate all rates and "all other matters pertaining to the formation, operation, or direction of public utilities." The statute also empowers the MPSC "to hear and pass upon all matters" incident to such regulation. Furthermore, pursuant to MCL 460.6j(6), the MPSC must review all submitted PSCR plans and evaluate the reasonableness and prudence of the decisions underlying those plans. Defendant's decisions regarding payments to QFs, which would be recovered from defendant's customers under the PSCR plan, clearly fell within the scope of the MPSC's statutorily mandated review.[17] A circuit court ruling interpreting the avoided cost formula to require defendant to pay plaintiffs a higher price for their power could affect the ultimate rate defendant's customers pay for service. As the Legislature imposed a duty on this regulatory agency to conduct such a review and conferred exclusive jurisdiction to set rates, the trial court properly deferred to its primary jurisdiction.

Moreover, the MPSC has special competence and unique expertise to review the underlying factual issues upon which plaintiffs' claims were based. The MPSC regularly determines the calculation and interpretation of avoided cost formulas. Whether defendant properly calculated its avoided costs and remunerated plaintiffs accordingly could easily be determined by the MPSC before the court reviewed any of plaintiffs' claims. Furthermore, as the MPSC had approved and subsequently amended the PPAs in question following several rate cases, it was in a better position to review and interpret the contract provisions, especially the avoided cost formula.[18] In fact, as previously noted, the MPSC found in U-13917 that its previous orders did not require defendant to calculate its avoided energy cost as alleged by plaintiffs. Deferring to the primary jurisdiction of the MPSC in this instance promoted

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[15] *Travelers Ins Co, supra* at 196-200 (footnotes omitted).

[16] *Att'y Gen v MPSC, supra*, 231 Mich App at 78.

[17] Plaintiffs contend that only the capacity charges portion of the avoided cost formula requires MPSC review under MCL 460.6j(13)(b). While the statute does expressly provide the procedure by which the MPSC reviews capacity charges, it does not limit the commission's review of the avoided energy cost portion of the formula.

[18] As jurisdiction is proper in the MPSC based on its previous approval of the PPAs alone, we need not determine whether the "regulatory out" or other clauses in the PPAs could confer continuing jurisdiction upon the MPSC.

consistency in the commission's orders regarding the calculation of avoided costs, an issue which certainly will recur over time.[19]

Plaintiffs also contend that they were denied the right to a jury trial over their common law contract claims when the trial court deferred to the primary jurisdiction of the MPSC. However, the courts have repeatedly found that claims based solely on the contractual relationship of the parties fall within the primary jurisdiction of the MPSC.[20] Plaintiffs further contend that the trial court was obligated to hear its case, as they requested equitable relief that the MPSC is not empowered to order. This Court has already determined, however, that the propriety of the MPSC's primary jurisdiction is not destroyed by the existence of equitable claims.[21]

Finally, plaintiffs contend that defendant was judicially estopped from asserting that the MPSC has primary jurisdiction over this dispute, as defendant previously argued in other proceedings that the MPSC does not have primary jurisdiction over its relationship with QFs. This contention is completely without merit. Judicial estoppel only precludes "a party who has *successfully* and unequivocally asserted a position in a prior proceeding . . . from asserting an inconsistent position in a subsequent proceeding."[22] However, defendant's previous argument was not completely successful in the prior proceeding. Defendant raised the challenged argument in U-8871 *et al.*, which was subsequently appealed to this Court.[23] This Court did find that the MPSC lacked the authority to limit the size of a QF that could supply power to defendant or to limit the total capacity that could be supplied by one type of fuel.[24] However, this did not limit the MPSC's power to simply adopt rules by which defendant could compute its own avoided costs.[25] As this Court has found that the MPSC has jurisdiction over many aspects of the relationships between public utilities and QFs, defendant was not estopped from making this argument.

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[19] For example, the MPSC's orders and opinions in U-8871 *et al.* and U-10127, which involved the calculation of the capacity charge portion of the avoided cost formula, was the subject of a series of published opinions by this Court.

[20] See *Travelers Ins Co, supra* at 67, citing *Valentine v Michigan Bell Tel Co*, 388 Mich 19, 25-26; 199 NW2d 182 (1972), and *Thomas v Gen Tel Directory Co*, 127 Mich App 788, 792; 339 NW2d 257 (1983); see also *Durcon Co v Detroit Edison Co*, 250 Mich App 553, 559-560; 655 NW2d 304 (2002), citing *Rinaldo's Constr Corp v Michigan Bell Tel Co*, 454 Mich 65, 78-79; 559 NW2d 647 (1997).

[21] *Stark Steel Corp v Michigan Consolidated Gas Co*, 165 Mich App 332, 339-340; 418 NW2d 135 (1987).

[22] *Paschke v Retool Indus*, 445 Mich 502, 509; 519 NW2d 441 (1994) (emphasis in original, citations omitted).

[23] *Consumers Power Co, supra*, 189 Mich App 151.

[24] *Id.* at 179.

[25] *Id.* at 171, 180.

III. Dismissal v Stay of Proceedings

Plaintiffs also challenged the trial court's dismissal of their claims without prejudice. They contend that, even if the trial court properly deferred to the primary jurisdiction of the MPSC, the court should have stayed the court proceedings pending MPSC review. When deferring to the primary jurisdiction of the MPSC, the court has the power to stay the proceedings and retain jurisdiction if the parties would be prejudiced by dismissal without prejudice.[26]

The six-year statute of limitations[27] expired on the earliest of plaintiffs' contract claims while the MPSC conducted its review, precluding further action on those claims in the trial court. The MPSC expressly declined to dispose of plaintiffs' claims arising between 1998 and 2003, as the proceedings then before it only involved defendant's proposed PSCR plan for 2004. It appears from the record that the MPSC's determination that defendant did not under-compensate plaintiffs eliminates any support for plaintiffs' claims. However, the trial court should make that determination upon a more comprehensive review.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly

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[26] *Travelers Ins Co*, *supra* at 207, quoting *Reiter v Cooper*, 507 US 258, 268-269; 113 S Ct 1213; 122 L Ed 2d 604 (1993).

[27] MCL 600.5807(8).